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# 'Ceci n'est pas .. Cassis de Dijon': Some Reflections on its Triple Regulatory Impact

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# 'Ceci n'est pas .. Cassis de Dijon': Some Reflections on its Triple Regulatory Impact\*

Inge Govaere<sup>1</sup>

## 1. Introduction

The *Cassis de Dijon* judgement of 1979<sup>2</sup> and the famous oil on canvas "*Ceci n'est pas une pipe*" (often translated in English as 'The Treachery of Images' or 'This is not a pipe') by the Belgian surrealist painter René Magritte half a century earlier,<sup>3</sup> have at least two characteristics in common. First of all, both learn that appearances may be treacherously deceptive. At face value *Cassis de Dijon*, by introducing the principle of mutual recognition, offered an easy and ready judge-made solution in response to EU regulatory inertia by reinstating the importance of national regulation at least of the export state. But as René Magritte warned by prominently inserting the words "*Ceci n'est pas une pipe*" on his painting of a tobacco pipe, what you see is not necessarily what you get.<sup>4</sup> A deeper scrutiny of *Cassis de Dijon* and its consequences reveals a fundamental and direct impact on ensuing regulatory practices, even if perhaps not necessarily so originally intended. This finding lies at the core of the below reflections on the regulatory impact of *Cassis de Dijon* on both the EU and Member States level. Secondly, the painting by René Magritte not only continues to puzzle many of its viewers. It has also triggered a debate between himself and the French philosopher and social theorist Michel Foucault,<sup>5</sup> which in itself has become a source of academic scrutiny and discussion until today.<sup>6</sup> In the same vein, *Cassis de Dijon* continues to spark discussion, puzzlement and controversy forty years after the judgment was rendered, not merely in academia but also within the Court itself. Over time this has led to an express albeit only partial reversal of *Cassis de Dijon* in the *Keck & Mithouard* judgment of 1993,<sup>7</sup> which in turn begged for further the clarification only rendered

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\* The final version will be published in *Cassis de Dijon: Forty Years On* edited by Albertina Albers-Llorens, Catherine Barnard & Brigitte Leucht (Hart, 2020).

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<sup>2</sup> Case 12/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, EU:C:1979:42.

<sup>3</sup> "*Ceci n'est pas une pipe*", oil on canvas painting, René Magritte, 1929.

<sup>4</sup> See for instance Pepperell, R., "Artworks as dichotomous objects: implications for the scientific study of aesthetic experience", *Frontiers in human neuroscience* (2015) 295, consulted online: <https://doi.org/10.3389/fnhum.2015.00295>, in particular just above figure 8 where he points out: "*The Treachery of Image's, better known as "This is not a pipe," is at once a bald statement of the obvious and a crafty self-denial, a patently true proposition that also undermines its own premise, a visual manifestation of the paradox wherein the statement "This statement is false" is both true and false, and a darkly humorous thesis on the indeterminacy of language and meaning. It is the "unreal" manner of its handling, as blandly illustrative, which alerts us to the dissonance between what we would expect to see in the presence of a real pipe and the pipe-like shape we actually confront.*"

<sup>5</sup> Foucault, M., *Ceci n'est pas une pipe*, 1973, Paris, Fata Morgana; Foucault, M. (James Harkness, translator), *This Is Not a Pipe*, 1983, University of California Press.

<sup>6</sup> See for instance Pepperell, R., o.c., who continues the above quote as follows: "*The philosopher Michel Foucault did his best to unravel the mystery of the painting by presenting it (not entirely convincingly, in my view) as a calligram—a word-image of the kind associated with Guillaume Apollinaire, the poet, critic and early supporter of the Cubist movement (Foucault, 1983). But like all true paradoxes, The Treason of Images cheerfully resists any attempt at rationalization and stubbornly asserts the fact that the shape above the words is clearly a pipe, and yet—being confected from paint—is also not a pipe*". For other academic debate on the discussions between Foucault and Magritte on this painting, see for instance Levy, S., "Foucault on Magritte on Resemblance", *The Modern Language Review* (1990) 50-56; Almans, G., "Foucault and Magritte", *History of European Ideas* (1982) 303-309; Margolis, J., "This Is not a pipe", *Journal of Aesthetics and Art Criticism* (1984) 224-225; Chambon, A.S., Irving, A. "They Give Reason a Responsibility Which It Simply Can't Bear: Ethics, Care of the Self, and Caring Knowledge", *Journal of Medical Humanities* (2003) 265–278 ; Levy, S., *Decoding Magritte*, Bristol, Sansom & Company, 2015.

<sup>7</sup> *Joined Cases C-267/91 and C-268/91, Keck & Mithouard*, EU:C:1993:905.

in the *Tripeds* case of 2009.<sup>8</sup> The creator is thus also here an active participant rather than a mere bystander in steering the discussions about the meaning and scope of the emerging picture.

Without seeking to be exhaustive on the matter, this contribution offers some reflections on what is conceived to be a triple yet intertwined regulatory impact of *Cassis De Dijon*. First attention is briefly given to its immediate impact on regulatory and democratic processes of European integration, as well as its decisive influence on shaping the new EU regulatory approach to harmonization. This is followed by some reflections on whether and to what extent this old judgment has an impact on the new delimitation of competences between the EU and the Member States, in particular in a new post-Lisbon setting which sought to clarify the division of competence. Lastly but importantly, consideration is given to the extent to which *Cassis de Dijon* has interfered with the regulatory capacity of the Member States in the absence of EU harmonization. In particular three tests seem to have emerged in the aftermath case law of *Cassis de Dijon*, each with potentially great impact on the Member States discretion to legislate: the 'straightjacket test', the 'rubber-stamp exercise', and the 'balancing trick'. All too often these distinct yet stringently interrelated regulatory implications of *Cassis de Dijon* have been assessed in isolation, thereby potentially missing out on the complexity of the bigger picture.

## 2. Impact on the EU Regulatory Practice

Is it an oxymoron to link *Cassis de Dijon* to positive EU regulatory practice? This simple question is not without importance as *Cassis de Dijon* came about precisely because of the lack of political willingness to adopt the regulatory framework at EU level needed to achieve the common market objective. As with every crisis since then, in reaction to the oil crisis of the seventies the emergence of nationalism and concurrent adoption of protectionist measures by individual Member States went hand in hand with provoking inertia of the EU decision making process. It is at such historic times of 'eurosclerosis',<sup>9</sup> whereby obstacles to free movement could hardly be removed through the adoption of EU harmonization measures with its inherent democratic checks and balances, that the CJEU firmly stepped in to keep the common market objective afloat.<sup>10</sup> A first and important reflection to start from is therefore that it is the very absence of EU regulatory activity that triggered the judge-made solutions in *Cassis de Dijon*, not vice versa. That being said, the impact in turn of *Cassis de Dijon* on the development of EU regulatory practice of course can hardly be overestimated; it is at least threefold and still ongoing today. Immediately apparent is the intended effect of the principle of mutual recognition on the necessity and especially the urgency of having EU regulation at all and the ensuing shift towards 'conditioned negative' harmonization. Less visible but equally crucial to consider is the impact of this judge-made principle on the democratic process and democratic legitimacy of the European integration process. Finally, *Cassis de Dijon* has also been instrumental in developing a new approach to EU harmonization combining negative and

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<sup>8</sup> Case C-110/05, *Commission v. Italy*, EU:C:2009:66.

<sup>9</sup> Giersch, H., "Eurosclerosis", (1985), *Kieler Diskussionsbeiträge*, No. 112, Institut für Weltwirtschaft (IfW), Kiel, as consulted online in a Digitized Version at <https://www.econstor.eu/bitstream/10419/48070/1/025296167.pdf>. At p. 4, he coined the term as follows: "The diagnosis for Europe's disease can be called Eurosclerosis." At p. 12 he proposes the following cure: "For coping with Eurosclerosis I suggest we turn to citizens rather than organisations, to ordinary people rather than politicians in office."

<sup>10</sup> See for instance Kelemen, D., *Eurolegalism: The Transformation of Law and Regulation in the European Union*, 2011, Harvard University Press, at p. 156; Awesti, A., "The Myth of Eurosclerosis: European Integration in the 1970s.", *L'Europe en Formation* (2009) 353 – 354; Saurugger, S., Terpan, F., *The Court of Justice of the European Union and The Politics of Law*, Plagrave Macmillan, 2016, p. 23 ff.

positive harmonization. Those three effects are necessarily linked but will be briefly explored in turn.

### **a. Shifting from ‘positive’ to ‘conditioned negative’ harmonization**

*Cassis de Dijon* exposed the fact that obstacles to free movement may not only arise because of discriminatory national measures, whether openly so or indirectly, but simply also because the laws in force in different Member States diverge. The normal response to counter a regulatory patchwork which thwarts the internal market objective consists in the adoption of a political decision<sup>11</sup> to deregulate at national level in favor of positive harmonization at EU level.<sup>12</sup> That is the only solution provided for in the Treaties since their inception and today still to be found in Articles 114 -118 TFEU. Blatant political unwillingness to do so, or a decision not to deregulate nationally in favor of EU harmonization, is then just as much a political act which sets the regulatory framework as its opposite. Against such a Treaty context, what then can a court do other than seek out the regulatory framework in force and apply it in practice, even if it means accepting obstacles to one of the four freedoms?

Surprisingly perhaps, especially at the time,<sup>13</sup> the CJEU did not consider this to be a rhetorical question. Instead, in *Cassis de Dijon* it formulated a truly revolutionary answer of the same magnitude to EU substantive law as the earlier *Van Gend en Loos*<sup>14</sup> ruling was to the autonomous EU legal order.<sup>15</sup> Quite ingeniously, the CJEU opted to radically depart from international trade rules by simply turning them on their head specifically for application within the common market. A simple mathematical equation lies at the basis of this move. There are manifold potential Member States of importation, but always only one Member States of exportation. Requiring compliance with the regulation in force in each state of *importation*, as is habitual in international trade, intrinsically poses problems for the free movement as a product needs to be modified accordingly whenever such legislation differs. The CJEU consequently ruled that in principle it should suffice to comply with the regulatory framework of the sole Member State of *exportation*. As a consequence a product can move freely between the Member States on the basis of a single regulatory framework adopted at national level, even in the absence of EU harmonization. The principle of mutual recognition thus introduced ‘negative’ harmonization in the sense that it rendered the adoption of ‘positive’ harmonization measures at EU level redundant or at least less urgent to achieve the common market objective. In that sense it interfered directly with the regulatory practice as foreseen in the Treaties by shifting the burden for ensuring the four freedoms from the EU legislator back to the level of the individual Member States. As will be seen below, this very exercise has not only undermined the role of the EU regulator<sup>16</sup> but concurrently also led the Member States to be put in a rather tight regulatory straightjacket.<sup>17</sup>

Concurrently the CJEU in *Cassis de Dijon* anticipated the potential consequences of introducing the principle of mutual recognition in terms of provoking unwarranted regulatory

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<sup>11</sup> By the Council and the European Parliament, under the legislative procedure.

<sup>12</sup> Whether through directives or regulations depending on the intended level of discretion left to the individual Member States in implementation.

<sup>13</sup> To understand the importance of *Cassis de Dijon* it is crucial not to reason with hindsight, in particular as the principle of mutual recognition today has become the norm.

<sup>14</sup> C-26/62, *Van Gend en Loos*, ECLI:EU:C:1963:1.

<sup>15</sup> I have argued elsewhere that *Van Gen den Loos* triggered a so-called “Balloon dynamic”, see Govaere, I., “Interconnecting Legal Systems and the Autonomous EU Legal Order: a Balloon Dynamic”, in Govaere, I., Garben, S., (eds), “The Interface Between EU and International Law: Contemporary Reflections”, Hart Publishing, 2019, pp. 19-43.

<sup>16</sup> See the below subsection c.

<sup>17</sup> See below, at pt. 4.

competition<sup>18</sup> between the Member States.<sup>19</sup> In particular set against the nationalist and protectionist mindset which was waging in the seventies, an unlimited application of the principle of mutual recognition might quickly lead to a downward legislative spiral or so-called 'race-to-the-bottom' to attract business and investment. As an indispensable counterweight to the principle of mutual recognition the CJEU thus exceptionally allowed a Member State to oppose its own legislation to importation if necessary and proportionate to protect higher objectives. Considering the underlying rationale in terms of regulatory competition, of necessity this logic could not be limited to the few derogations expressly foreseen in the Treaties, such as public health in Article 36 TFEU. Therefore the CJEU expressly ruled in *Cassis de Dijon* that an open ended list of mandatory requirements, such as consumer protection or environmental protection, could additionally be invoked.

Whilst this counterweight to the principle of mutual recognition is to be much welcomed to avoid a race-to-the-bottom, it has also been criticized for unduly interfering with the regulatory discretion of Member States in non-economic matters<sup>20</sup> which, in particular at the time of *Cassis de Dijon*, were largely outside the realm of the economically oriented internal market rules.<sup>21</sup> On the one hand it did keep the regulatory initiative for such higher objectives in the hands of the individual Member States. But on the other hand it firmly subjected the exercise of any such regulatory discretion to judicial scrutiny at EU level for compliance with the double justification and proportionality test. The rationale underlying this double test can however also be linked to the possible occurrence of unwarranted effects of regulatory competition triggered by the principle of mutual recognition, but now in the opposite direction. A race-to-the-top can of course in itself not totally be avoided by the introduction of the justification and proportionality tests; only EU harmonization can solve that type of regulatory competition between the Member States. But at least it can try to ensure that a distinction is duly made between truly 'protective' measures of the Member States which are allowed, and 'protectionist' measures which are prohibited.<sup>22</sup> This then furthermore entails that Member States are forced to take into account not only EU legal constraints but also regulatory activity across the border, as such a test is bound to fail in case a higher objective is already duly taken into consideration by the Member State of exportation.<sup>23</sup> As such, *Cassis de Dijon* has not just provoked but also heavily conditioned 'negative' harmonization at the level of the Member States.<sup>24</sup>

### ***b. A slippery slope of 'judge made' versus democratic legitimacy***

In the economic and political context of the seventies, *Cassis de Dijon* may well have been a make-or-break ruling for the internal market which, in turn, was instrumental to maintain peace

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<sup>18</sup> On this concept, see for instance Esty, D., and Geradin, D. (eds.), "Regulatory competition and economic integration: comparative perspectives", Oxford University Press, 2001; Radaelli, C., "The Puzzle of Regulatory Competition", *Journal of Public Policy* (2004) 1-23; Deakin, S., "Is regulatory competition the future for European integration?", *Swedish Economic Policy Review* (2006) 71-95; Gabor, B., *Regulatory Competition in the Internal Market*, Edward Elgar Publishing, 2013; Stark, J., *Law for Sale: A Philosophical Critique of Regulatory Competition*, Oxford University Press, 2019.

<sup>19</sup> For a detailed analysis of the causes and solutions of regulatory competition between Member States, see Govaere, I., "L'établissement des règles des marchés nationaux ou régionaux: de l'Etat régulateur souverain aux organisations d'intégration régionale promotrices, protectrices et intermédiaires", *R.I.D.E.*, 3-4/2003, pp. 313-337; Garben, S., Govaere, I., "The Multi-faceted Nature of Better Regulation", in Garben, S., Govaere, I., (eds), "The EU Better Regulation Agenda: A Critical Assessment", Hart Publishing, 2018, pp. 3-12.

<sup>20</sup> See below at pt. 3.

<sup>21</sup> See below at pt. 3.b. for the changing objectives and dynamics of the internal market

<sup>22</sup> See for instance for this sometimes fine divide in relation to the precautionary principle: Ellen Vos, "Le principe de précaution et le droit alimentaire de l'union européenne," *Revue internationale de droit économique* (2002) 219-252.

<sup>23</sup> See in particular the 'rubber stamp exercise' below at pt. 4.b.

<sup>24</sup> For further effects on the Member States in their regulator capacity, see *infra* at pt. 4.

and stability on the European continent. Seen in this broader context, this ruling and follow up case law is to be welcomed for relentlessly pursuing a fundamental objective of the EU Treaties, unanimously agreed upon by all the Member States and ratified in each Member State according to the constitutional rules and democratic safeguards. Paradoxically, however, precisely because of the above mentioned regulatory impact of the solutions which it proposes it at the same time raises crucial questions in terms of ongoing respect for democratic process and democratic legitimacy. A widely discussed issue in this respect concerns the encroaching effect on the Member States democratic processes through so-called 'creeping competences', which will be briefly touched upon further on.<sup>25</sup> Due attention should, however, also be given to the more direct and straightforward interference with the democratic processes for the adoption of binding rules by the European Union institutions themselves.

The debate on over-constitutionalization of the internal market in particular as projected against a perceived under-democratization of the EU has been elaborated upon already elsewhere.<sup>26</sup> Suffice it to point here to the emergence of an inherently constitutional nature attributed to the principle of mutual recognition. As a binding interpretation of the primary law, the CJEU's ruling in *Cassis de Dijon* can no longer be altered by EU secondary law even if it is precisely the absence of the latter which it sought to compensate. The judge made principle of EU law not only has primacy and direct effect and thus a huge impact on the regulatory framework in force in any Member State.<sup>27</sup> It simultaneously dispenses with the immediate need for secondary EU law which could have benefitted from the input of various stake holders and democratic control.

As the CJEU derives its legitimacy directly from primary law<sup>28</sup> and in *Cassis de Dijon* also interpreted Treaty provisions on the free movement of goods, only a Treaty amendment could override or alter this ruling. The flanking condition is of course that such would be unanimously agreed and enacted by the Member States as masters of the Treaties in compliance with the procedure laid down in Article 48 TEU. A democratic remedy is thus in theory available to tackle *Cassis de Dijon* provided there is strong political willingness to do so. The question is whether the various Treaty modifications which took place after 1979 and seemingly did not take issue with *Cassis de Dijon*, contrary to other judgments,<sup>29</sup> may then serve to underscore its legitimacy post factum. Interesting as this may be, more decisive in this respect is probably the finding that the other EU institutions, at the instigation of the Commission, openly embraced the principle of mutual recognition and quickly made it their own, as is reflected upon in the next section. Furthermore, undisputable proof of post factum democratic legitimation was given in 2008 with the formal adoption of the EU Mutual Recognition Regulation<sup>30</sup> to reinforce

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<sup>25</sup> See infra at pt. 3.

<sup>26</sup> See Garben, S., Govaere, I., Nemitz, P., "Critical Reflections on Constitutional Democracy in the European Union and its Member States", in Garben, S., Govaere, I., Nemitz, P. (eds), "Critical Reflections on Constitutional Democracy in the European Union", Hart Publishing, 2019, pp. 1-21.

<sup>27</sup> See infra at pt 4.

<sup>28</sup> Sacha Garben also points to the fact that 'harmonisation by stealth' through case law "could be considered constitutionally legitimate, at least to a certain extent, since the Treaties endow the CJEU explicitly with the task and power to interpret EU law", see Garben, S." Restating the Problem of Competence Creep, Tackling Harmonisation by Stealth and Reinstating the Legislator", In Garben, S., Govaere, I., (eds), "The Division of Competences between the European Union and its Member States: Reflections on the Past, Present and Future", Hart Publishing, 2017, at p. 319.

<sup>29</sup> Such as for instance the *Ecovas* ruling of the CJEU and the ensuing amendment of Article 40 TEU, see C-91/05 , *Commission v Council* , ECLI:EU:C:2008:288. For an analysis, see Van Elsuwege, Peter, "On the Boundaries Between the European Union's First Pillar and Second Pillar: a Comment on the ECOWAS Judgment of the European Court of Justice." THE COLUMBIA JOURNAL OF EUROPEAN LAW (2009) 531–548.

<sup>30</sup> Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC (OJ L 218, 13.8.2008, p. 21).

the *Cassis De Dijon* logic in practice. The latter was revisited and replaced in 2019<sup>31</sup> inter alia by introducing the voluntary 'mutual recognition declaration'<sup>32</sup> besides the 'Product Contact Points' to be established by each Member State,<sup>33</sup> all of which serve help enforce the *Cassis de Dijon* ruling at the level of the market participants.

### ***c. Triggering a new approach to harmonization***

In the aftermath of *Cassis de Dijon*, the Commission proactively proposed to instrumentalize the principle of mutual recognition as a 'positive' regulatory tool. It put forward a 'new approach' whereby negative and positive harmonization would be successfully combined.<sup>34</sup> This was part of the exercise to launch the 1992 internal market objective by thoroughly revisiting EU regulatory practice 'drawing on the lessons from the past'. In the 1985 Commission white paper on the completion of the internal market two important changes to enhance the efficiency of the EU regulatory framework were put on the table. Both also implied a crucial restriction on the sovereignty of the Member States not least in their regulatory capacity.

Firstly, the Member States had to cede sovereignty by giving up their veto right for the adoption of internal market harmonization measures, at least as a matter of principle. This was accepted by the Member States and firmly anchored in primary EU law by the Single European Act.<sup>35</sup> In so-doing the role and impact of each individual Member State in the EU regulatory process is from then on inherently weakened. Additionally direct control is lost over the enactment of laws that would become applicable on their territories.

Secondly, the Commission proposed to adopt a new harmonization strategy which was explained as follows:

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<sup>31</sup> EU Regulation (EU) 2019/515 of the European Parliament and of the Council 'on the mutual recognition of goods lawfully marketed in another Member State', OJ L 91, 29.3.2019, p. 1. At pt 16 preamble it states: "To raise awareness on the part of national authorities and economic operators of the principle of mutual recognition, Member States should consider providing for clear and unambiguous 'single market clauses' in their national technical rules with a view to facilitating the application of that principle."

<sup>32</sup> Article 4(1) of Regulation 2019/515, o.c., stipulates the modalities of the mutual recognition declaration : "The producer of goods, or of goods of a given type, that are being made or are to be made available on the market in the Member State of destination may draw up a voluntary declaration of lawful marketing of goods for the purposes of mutual recognition ('mutual recognition declaration') in order to demonstrate to the competent authorities of the Member State of destination that the goods, or the goods of that type, are lawfully marketed in another Member State".

<sup>33</sup> Article 9 (2) of Regulation 2019/515, o.c., provides: "Product Contact Points shall provide the following information online: (a) information on the principle of mutual recognition and the application of this Regulation in the territory of their Member State, including information on the procedure set out in Article 5; (b) the contact details, by means of which the competent authorities within that Member State may be contacted directly, including the particulars of the authorities responsible for supervising the implementation of the national technical rules applicable in the territory of their Member State; (c) the remedies and procedures available in the territory of their Member State in the event of a dispute between the competent authority and an economic operator, including the procedure set out in Article 8."

<sup>34</sup> "Completing The Internal Market: White Paper From The Commission To The European Council", 1985, COM/85/0310 Final, at para 64: "But while a strategy based purely on mutual recognition would remove barriers to trade and lead to the creation of a genuine common trading market, it might well prove inadequate for the purposes of the building up of an expanding market based on the competitiveness which a continental-scale uniform market can generate. On the other hand experience has shown that the alternative of relying on a strategy based totally on harmonization would be over-regulatory, would take a long time to implement, would be inflexible and could stifle innovation. What is needed is a strategy that combines the best of both approaches but, above all, allows for progress to be made more quickly than in the past."

<sup>35</sup> See the current Article 114 §1 TFEU, yet note that this is not so or the most sensitive areas (Article 114 § 2) and counterbalanced by the possibility to exceptionally derogate (Article 114 §4-6).

*“a clear distinction needs to be drawn in future internal market initiatives between what it is essential to harmonize, and what may be left to mutual recognition of national regulations and standards; this implies that, on the occasion of each harmonisation initiative, the Commission will determine whether national regulations are excessive in relation to the mandatory requirements pursued and, thus, constitute unjustified barriers to trade according to Article 30 to 36 of the EEC Treaty ; - legislative harmonisation (Council Directives based on Article 100) will in future be restricted to laying down essential health and safety requirements which will be obligatory in all Member States. Conformity with this will entitle a product to free movement”.*<sup>36</sup>

The ensuing new EU regulatory strategy thus implies that positive harmonization measures will only be formulated, negotiated and decided in relation to those impediments to the internal market that are not already neutralized by the application of the principle of mutual recognition. In the new approach to harmonization this is further combined with standardization by standardization bodies where possible, so that the positive harmonization exercise through the EU decision making process is limited to agreeing on the essential requirements in the general interest.<sup>37</sup>

In essence this puts the focus of internal market harmonization extremely narrowly and sharply, but also very firmly, on the higher objectives such as Article 36 TFEU and the open list of mandatory requirements accepted by the CJEU in *Cassis de Dijon* as the indispensable counterbalance to the principle of mutual recognition. Such a deliberate and upfront use of *Cassis de Dijon* in all its complexities clearly has a positive impact on the EU regulatory process in terms of efficacious and quick decision-making. But at the same time it highly reduces and targets the scope of positive regulatory action at EU level in a manner which provokes questions in terms of delimitation of competence, and thus also respect for Member States regulatory competence, as conceived in the Treaties

### **3. Impact on Delimitation EU - Member States Regulatory Competence**

Both the *Cassis de Dijon* ruling and its proactive regulatory use by virtue of the new approach to harmonization have been heavily criticized for the unwarranted impact on the delimitation of regulatory competence as conceived in the Treaties. The higher objectives and mandatory requirements are often considered as sensitive and crucial to the Member States, so that not surprisingly competence in those matters is not usually plainly conferred to the EU.<sup>38</sup> To the contrary, as is now firmly stated in Articles 2 to 6 TFEU introduced by the Lisbon Treaty, the

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<sup>36</sup> COM/85/0310 Final, o.c., at para 65.

<sup>37</sup> This is further combined with standardization, see also Council Resolution 85/C 136/01 of 7 May 1985 on a new approach to technical harmonization and standards, OJ C 136, 4.6.1985, p. 1, whereby four fundamental principles were established: “legislative harmonisation is limited to essential safety requirements (or other requirements in the general interest) with which products put on the market must conform and can therefore enjoy free movement throughout the European Union; the task of drawing up technical production specifications is entrusted to organisations competent in industrial standardisation, which take the current stage of technology into account when doing so; these technical specifications are not mandatory and maintain their status of voluntary standards; the authorities are obliged to recognise that products manufactured in conformity with harmonised standards are presumed to conform to the essential requirements established by the Directive. If the producer does not manufacture in conformity with these standards, he has an obligation to prove that his products conform to the essential requirements. Two conditions have to be met in order that this system may operate: the standards must guarantee the quality of the product; the public authorities must ensure the protection of safety (or other requirements envisaged) on their territory. This is a necessary condition to establish mutual trust between Member States.” See also Regulation (EU) No 1025/2012 of 25 October 2012 on European Standardisation, (2012) OJ L 316/12.

<sup>38</sup> See Garben, S., Govaere, I., (eds), “The Division of Competences between the European Union and its Member States: Reflections on the Past, Present and Future”, Hart Publishing, 2017.

nature of such EU competence is mainly shared (such as for environmental protection),<sup>39</sup> or complementary or supporting to that of the Member States (for instance public health).<sup>40</sup> The potential impact thereof on the regulatory capacity of the EU and the Member States respectively has, however, significantly shifted with the reformulation of the internal market objective in the Lisbon Treaty.

### **a. Pre-Lisbon competence creep**

How can the new approach to harmonization expressly target EU regulation of higher objectives which are not fully conferred to the EU. Faced with this conundrum from the perspective of the principle of conferral the CJEU elaborated the so-called *Tobacco Directive* test in a pre-Lisbon setting.<sup>41</sup> EU harmonization measures may incidentally relate to such higher objectives and be adopted on the basis of Article 114 TFEU if the aim is:

*“to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them”.*<sup>42</sup>

Such thus became the standard criterion to delineate the internal market based regulatory competence of the EU. Whereas a mere finding of disparities between national rules would not do the trick, this was said to be different for an identified ‘obstruction of the fundamental freedoms’ or a need ‘to prevent the emergence of future obstacles to trade’.<sup>43</sup>

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<sup>39</sup> Article 4 TFEU lists as shared competence besides the internal market, social, environment and consumer protection as well as under (k) ‘common safety concerns in public health matters, for the aspects defined in this Treaty’.

<sup>40</sup> Article 6 TFEU expressly confers only supporting/complementary EU competence in relation to for instance protection and improvement of human health as well as culture.

<sup>41</sup> Supported by Article 114 (3) TFEU which stipulates that: “The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.”

<sup>42</sup> Case C-376/98, *Germany v. European Parliament and Council of the European Union, Tobacco*, EU:C:2000:544, see para 86.

<sup>43</sup> Case C-547/14 *Philip Morris* EU:C:2016:325, see in particular paras 58-60: “In that regard, while a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 114 TFEU, it is otherwise where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market (see, to that effect, judgments in *Germany v Parliament and Council*, C-376/98, EU:C:2000:544, paragraphs 84 and 95; *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraphs 59 and 60; *Arnold André*, C-434/02, EU:C:2004:800, paragraph 30; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 29; *Germany v Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 37; and *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 32).

(59) It is also settled case-law that, although recourse to Article 114 TFEU as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade as a result of divergences in national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them (judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 61; *Arnold André*, C-434/02, EU:C:2004:800, paragraph 31; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 30; *Germany v Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 38; and *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 33).

(60) The Court has also held that, provided that the conditions for recourse to Article 114 TFEU as a legal basis are fulfilled, the EU legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made (judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 62; *Arnold André*, C-434/02, EU:C:2004:800, paragraph 32; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 31; and *Germany v Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 39).”

Already prior to the Lisbon Treaty, several authors had drawn attention to the phenomenon of ‘competence creep’<sup>44</sup> or ‘harmonization by stealth’<sup>45</sup> as amplified by the rulings in *Cassis de Dijon* and *Tobacco Directive*. Solutions had also been explored to contain the extent of the problem, for instance by ‘restricting the restrictions’ to the free movement in the aftermath of *Cassis de Dijon*.<sup>46</sup> The latter has famously extended the scope of application of the rules on free movement to include also measures that are not discriminatory in nature, whether openly or indirectly so. It is as a direct consequence thereof that national measures regulating higher objectives came under a quasi-automatic scrutiny by the CJEU for compliance with the justification and proportionality tests<sup>47</sup> and the targeted focus of EU regulation.<sup>48</sup> The reasoning goes that reverting to a more restrictive reading of the internal market provisions, in particular in relation to indistinctly applicable measures, will then automatically lead to EU law interfering less with national regulation and leaving more intact the non-economic policy choices of the Member States in relation to such higher objectives. Similar reflections most likely prompted the above mentioned follow up case law in *Keck and Mithouard* (as in turn further clarified in the *Tripeds* judgment) which partially reversed *Cassis de Dijon* by expressly limiting its scope of application.<sup>49</sup>

### ***b. Post-Lisbon untapped potential***

Underlying this whole discussion is the often unspoken but crucial issue regarding the perceived nature of the regulatory interaction in a system of multi-layered governance.<sup>50</sup> More often than not it is presented as dichotomous, implying that internal market integration at EU level necessarily goes at the cost of non-economic policy choices at the level of the Member States. The true challenge nonetheless lies in the opposite move towards integrating the internal market further in pursuance of such higher non-economic objectives also at EU level,<sup>51</sup> whilst leaving some flexibility at the level of the Member States.

It has been argued elsewhere that now, for the first time, the Lisbon Treaty allows for such a fundamental shift in approach to be firmly made, even though so far this has largely been ignored in practice.<sup>52</sup> Article 3(3) TEU has radically redrafted the former ‘reactive’ and

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<sup>44</sup> Weatherill, S., “Competence Creep and Competence Control”, *Yearbook of European Law* (2004) 1-55; Garben, S., “Competence Creep Revisited”, *JCMS* (2017) 1–18.

<sup>45</sup> Garben, S., “Restating The Problem of Competence Creep, Tackling Harmonisation by Stealth and Reinstating the Legislator”, in Garben, S., Govaere, I., (eds), “The Division of Competences between the European Union and its Member States: Reflections on the Past, Present and Future”, Hart Publishing, 2017, pp. 300-335.

<sup>46</sup> Barnard, C., “Restricting restrictions: Lessons for the EU from the US?”, *The Cambridge Law Journal* (2009) 575 – 606.

<sup>47</sup> See supra at pt. 2.a.

<sup>48</sup> See supra at pt. 2.c.

<sup>49</sup> See supra at pt. 1.

<sup>50</sup> On this concept see L. Hooghe, G. Marks, “Multi-level Governance and European Integration”, Rowman & Littlefield, 2001.

<sup>51</sup> See also Davies, G., “The Competence to Create an Internal Market: Conceptual Poverty and Unbalanced Interests”, in Garben, S., Govaere, I., (eds), “The Division of Competences between the European Union and its Member States: Reflections on the Past, Present and Future”, Hart Publishing, 2017, pp. 74-89, specifically at p. 85-86: “*The Union should be able to do the things necessary to create a well-functioning market, which includes creating a market-ready society-fair, tolerant, lacking opportunities for exploitation, redistributive, mutually understanding, skeptical of economics, not too materialistic, protective of its weaker members and areas, and with a job-market which allows welfare-enhancing participation in that market for all: or at least this is one mainstream European political view-and it should be able to say openly that it is doing this, and not have to always pretend that it is merely seeking to facilitate and expand trade, for that is just one tiny part of what establishing a market may be thought to entail.*”

<sup>52</sup> See Govaere, I., “Internal Market Dynamics: on Moving Targets, Shifting Contextual Factors and the Untapped Potential of Article 3(3) TEU”, in Garben, S., Govaere, I., (eds), “Internal Market 2.0”, Hart Publishing, 2020, at

'instrumental' internal market objective using much more 'proactive' and 'purposeful' wording. It clearly states as follows:

*"The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.  
It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.  
It shall promote economic, social and territorial cohesion, and solidarity among Member States.  
It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced".*

The Lisbon Treaty thus expressly and purposely provides that the establishment of the internal market is an objective of itself and, moreover, pro-actively works to respect and promote also non-economic higher objectives. Furthermore, the internal market rules are of course also subject to the provisions of general application as listed in article 7 to 13 TFEU which are echoed in Article 3(3) TEU. As developed elsewhere,<sup>53</sup> the Lisbon Treaty thus provides the necessary legal framework for such a more pro-active internal market which positively intertwines with other regulatory policies to be adopted at EU level.<sup>54</sup> Such an important legal contextual change would then also warrant a renewed appraisal of the regulatory implications of *Cassis de Dijon* in a post-Lisbon setting.

#### **4. Impact on Member States National Regulatory Discretion**

From the above reflections it is plain that *Cassis de Dijon* unwittingly started a snowball effect which heavily impacted the EU regulatory competence and process as conceived by the Member States in the Treaties. Concurrently it has also served to greatly curtail the discretion of the Member States to formulate positive regulation, economic or non-economic, at national level. The latter regulatory consequence of *Cassis de Dijon* has received much less attention so far but is nonetheless actively pursued by the Commission. The paradox lies in that *Cassis de Dijon* meant to upgrade the importance of national legislation in the absence of EU harmonization but instead triggered three unwarranted yet interrelated positive law effects: the 'straightjacket test', the 'rubber-stamp exercise', and the 'balancing trick'. The straightjacket test refers to the extent to which national positive law drafting has been influenced by the contours of the principle of mutual recognition. The rubber-stamp exercise goes a step further and denotes the 'positive' dictate to codify the principle of mutual recognition into national law. The balancing trick completes the picture of imposing the *Cassis de Dijon* logic onto the

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press. In particular under pt III it is inter alia pointed out that it is striking that the CJEU seemingly remains oblivious of these Treaty changes as it simply continues to apply the *Tobacco Directive* test also post-Lisbon.

<sup>53</sup> For a detailed analysis, see I Govaere, 'Modernisation of the internal market: potential clashes and crossroads with other policies' in M De Vos (ed), *European Union Internal Market and Labour Law: Friends or Foes?* (Intersentia, 2009) 3-17; for a slightly amended version see I Govaere, 'The Future Direction of the EU Internal Market: On Vested Values and Fashionable Modernism' (Winter 2009/2010) 16/1 *The Columbia Journal of European Law* 67-80 .

<sup>54</sup> On the link between internal market and higher objectives, see also B De Witte, 'A competence to protect: the pursuit of non-market aims through internal market legislation' in P Syrpis, *The Judiciary, the Legislature and the EU Internal Market* (Cambridge, Cambridge University Press, 2012) 25-46; B De Witte, 'Non-market values in internal market legislation' in N Nic Shuibhne (ed), *Regulating the Internal Market* (Cheltenham, Edward Elgar, 2006) 61-86.

national regulator not just in relation to the principle of mutual recognition but also as concerns the indispensable counterweight represented by the higher objectives. Although those three tests are of course stringently interrelated they will briefly be addressed in turn.

**a. The Straightjacket Test: ‘pure’ negative integration with positive law implications**

*Cassis de Dijon* is a prime example of ‘negative’ integration. As stated above, by virtue of the principle of mutual recognition it allows for free movement of economic commodities, also in the absence of positive measures adopted at EU level, by upgrading the importance of the regulatory framework in place in the Member State of exportation.<sup>55</sup> Surprisingly little attention has thereby gone to the cost thereof in terms of positive law constraints at the level of the Member States. A reason might be that the regulatory implications of *Cassis de Dijon* eating away at national regulatory discretion are not immediately apparent. As a judge made principle of EU law with primacy over national law, it would suffice to invoke the principle of mutual recognition to restrict national laws merely in their application. National law could then, as a matter of principle, simply no longer be opposed to goods produced and marketed in compliance with the regulatory framework in vigor in the Member State of exportation. In other words, there is strictly speaking no need to modify or streamline national law to achieve the internal market objective as pursued by *Cassis de Dijon*.

In practice, however, the logic of *Cassis de Dijon* has forced the Member States to carefully draft the scope of application of their national legislation in a targeted manner to keep it fully within their regulatory discretion. The premise to the principle of mutual recognition is that, in the absence of EU harmonization measures, Member States may freely regulate both domestic and export production, provided that this is done on a truly non-discriminatory basis. The backdrop is that as soon as the limits of this regulatory discretion are trespassed the internal market rules potentially kick in, requiring the national measure to survive the double justification and proportionality test. A combined reading of the *Iberian Pigs*<sup>56</sup> and *Emmenthal Cheese*<sup>57</sup> cases illustrates that this is taken to the letter and effectively limits the regulatory freedom in its expression rather than merely in its application.

The *Iberian Pigs* case is proof of the fact that Member States can indeed proactively avoid a competence creep, and thus potential EU interference with non-economic policy choices, by imposing the necessary self-restraint whilst exercising national regulatory discretion. In particular a double limitation should be clearly, if perhaps not necessarily expressly, made apparent to escape the application of Articles 34 and 35 TFEU respectively; the fact that the national regulation exclusively contains local production requirements, coupled with inherently non-discriminatory export rules. If and only if the CJEU is satisfied that both limitations follow from the wording of the national legislation, will the latter remain outside the scope of internal market rules so that also no justification needs to be given.<sup>58</sup> In contrast, the *Emmenthal*

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<sup>55</sup> See supra at pt. 2.a.

<sup>56</sup> Case C-169/17, Asociación Nacional de Productores de Ganado Porcino v. Administración del Estado (*Iberian Pigs*), EU:C:2018:440.

<sup>57</sup> Case C-448/98, Guimont ( *Emmenthal Cheese*), EU:C:2000:663.

<sup>58</sup> Case C-169/17, o.c., at para 28. “...it cannot be held that Article 34 TFEU precludes national legislation, such as that at issue in the main proceedings, which provides that the sales designation ‘ibérico de cebo’ may be granted only to products that comply with certain conditions imposed by that legislation, since that legislation permits the importation and marketing of products from Member States other than the State that adopted the legislation at issue, under the designations they bear pursuant to the rules of the Member State of origin, even if they are similar, comparable or identical to the designations provided for in the national legislation at issue in the main proceedings”; and at para 30- 31: “In the present case, it should be noted that the legislation at issue in the main proceedings does not distinguish between products destined for the domestic market and those destined for the EU market. All Spanish producers wishing to sell their Iberian pig products under the sales designations laid down in Royal Decree

*Cheese case* acts as a reminder that without such a careful drafting of national laws the internal market rules will immediately kick in to limit the regulatory discretion of the Member States, even in what at first sight seem to be purely national situations. The argument that the case concerned French regulation enforced exclusively upon a French producer, in relation to production and sale of cheese on French soil, proved to be of no avail. Nor did the argument carry any weight that in practice this regulation was never opposed to imported products. Contrary to the Opinion of Advocate General Saggio,<sup>59</sup> the CJEU simply pointed out that this limitation was not apparent from the wording of the national law.<sup>60</sup> Instead, the French regulation was assessed upon its potential impediment to imports of cheese lawfully manufactured in other Member States and found to be incompatible with the internal market rules for failing the proportionality test.<sup>61</sup> This illustrates perfectly well that the national regulator not only has to be known to uphold the principle of mutual recognition in practice, but unequivocally to be seen to do so through its legislative activity. The national legislator is thus firmly put into the straightjacket designed by *Cassis de Dijon*.

### **b. The Rubber-Stamp Exercise**

The straightjacket test is essentially a voluntary restraining exercise to be performed by the national regulator. It is applied on a strictly optional basis, only if and when it proactively wants to escape potentially unwarranted consequences of *Cassis de Dijon*. There is however no guarantee that this test will always and systematically be taken on board in practice. The fact that the national regulatory context does not properly reflect the applicable EU rules and principles applying to intra-EU trade is of course not legally problematic considering the characteristics of primacy and direct effect. It does, however, raise concerns in terms of transparency and legal certainty for actors in the market who may not all be EU law specialists and simply turn to national law to appraise the applicable regulatory framework. Most likely this explains why the Commission has initiated infringement proceedings to force national regulators to proactively and systematically write the principle of mutual recognition into their laws.

Highly important in this respect is the *Foie Gras* case, whereby the CJEU for the first time and as a matter of principle agreed with the Commission that the Member States should perform

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4/2014 are required to comply with the requirements of that decree, regardless of the market on which they wish to sell their products. Accordingly, it must be held that Article 35 TFEU does not preclude national legislation such as Royal Decree 4/2014.”

<sup>59</sup> Case C-448/98, Opinion of Advocate General Saggio, ECLI:EU:C:2000:117, at pts 7 & 8.

<sup>60</sup> Case C-448/98, o.c., at para 14-17: “On the one hand, the French Government argues that the inapplicability of Article 30 follows from the simple fact that the rule which Mr Guimont is accused of infringing is not, in practice, applied to imported products. It maintains that that rule was designed to create obligations solely for national producers and does not therefore concern intra-Community trade in any way. In its submission, the case-law of the Court of Justice, and particularly the judgment in Case 98/86 *Mathot* [1987] ECR 809, paragraphs 8 and 9, demonstrates that Article 30 of the Treaty is designed to protect only intra-Community trade.

15. In response to that argument, it should be observed that Article 30 of the Treaty covers any measure of the Member States which is capable, directly or indirectly, actually or potentially, of hindering intra-Community trade (Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, paragraph 5). However, that article is not designed to ensure that goods of national origin enjoy the same treatment as imported goods in every case, and a difference in treatment as between goods which is not capable of restricting imports or of prejudicing the marketing of imported goods does not fall within the prohibition contained in that article (*Mathot*, paragraphs 7 and 8).

16. However, as regards the national rule at issue in the main proceedings, the French Government does not deny that, according to its wording, it is applicable without distinction to both French and imported products.

17. This argument of the French Government cannot therefore be accepted. The mere fact that a rule is not applied to imported products in practice does not exclude the possibility of it having effects which indirectly or potentially hinder intra-Community trade (see Case C-184/96 *Commission v France* [1998] ECR I-6197, paragraph 17).”

<sup>61</sup>Case C-448/98, o.c., at para 25-27.

such a positive law rubber-stamp exercise of *Cassis de Dijon*.<sup>62</sup> The CJEU succinctly concluded that:

*“by adopting Decree No 93-999 of 9 August 1993 relating to preparations with foie gras as a base without including in it a mutual recognition clause for products coming from a Member State and complying with the rules laid down by that State, the French Republic has failed to fulfil its obligations under (now Article 34 TFEU)”*.<sup>63</sup>

In other words, *Cassis de Dijon* is from then on no longer considered merely as a judge made principle of EU law which may limit the application of national law. It is turned into a positive obligation resting on the national regulator to duly codify the principle of mutual recognition in all relevant laws, failure of which may in itself constitute a breach of EU law.

Furthermore, the CJEU in so-doing also acknowledged the attribution of a preventative role to the principle of mutual recognition. The insertion in all national legislation is held to be obligatory, as a matter of principle, regardless of the specific circumstances of the case. It is interesting to note that Advocate General La Pergola had strongly argued against this suggestion of the Commission, instead calling upon the CJEU to simply dismiss the case in particular having regards to the facts.<sup>64</sup> Foie gras is a typical French product, France did not (nor was it likely in the foreseeable future to) import foie gras, and on top of that no other Member State at that time had at all regulated the production of foie gras.

The latter finding in itself already poses a problem in terms of the very definition of mutual recognition. How can the principle of mutual recognition überhaupt apply in the absence of a regulatory framework in the Member State of exportation ? As the Advocate General La Pergola pointed out:

*“It follows from what we have seen so far that the requirement of mutual recognition for the purposes of lawful marketing on national territory — which, according to the Commission, is incumbent on France — concerns not preparations with foie gras as a base 'lawfully produced or marketed in other Member States' (a category which is nonexistent at present), but solely goods of that type produced 'in accordance with fair and traditional practices' in the Member State of origin”*.<sup>65</sup>

Interestingly enough the CJEU did not engage in this important discussion, but instead expressly framed the principle of mutual recognition in its conclusion (see above), as obeying the following double test: relating to ‘products coming from a Member State’ and complying with ‘the rules laid down by that State’. It is striking, firstly, that the CJEU did not restate that the products should be ‘produced’ in the Member State of exportation, thus indicating that perhaps products imported from third countries and lawfully put on the market in the Member of exportation could benefit from the principle of mutual recognition also. Secondly, the CJEU did seem to indicate that the existence of ‘rules’ and thus of a truly regulatory framework in the Member State of exportation is required as a condition to trigger mutual recognition. A deregulated system or mere compliance with traditional practices and custom in the export state would then simply not do the trick.

The regulatory impact of the *Foie gras* case is thus manifold, both in terms of imposing *Cassis de Dijon* terms onto the national regulator and for revisiting the role, function and definition of the principle of mutual recognition alike. It is also an unusually blunt ruling in that it revisits

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<sup>62</sup> Case C-184/96, Commission v. France (Foie Gras), EU:C:1998:495.

<sup>63</sup> Case C-184/96, o.c., see conclusion.

<sup>64</sup> Case C-184/96, Commission v. France (Foie Gras), Opinion of Advocate General La Pergola ECLI:EU:C:1997:495, see in particular at pt. 36.

<sup>65</sup> Idem, at pt. 35.

the crisscross relations between the EU and the Member States as well as the judiciary and the regulator very much as a bull in a china shop.

### **C. The Balancing Trick**

Not surprisingly the *Foie gras* case has triggered follow up cases with the Commission feeling strengthened in its role of enforcer of the principle of mutual recognition upon the national legislator and the latter offering great resistance thereto. In two follow up cases France in particular strongly pushed back.

In the so-called *Additives* case,<sup>66</sup> France forcefully argued that the *Cassis de Dijon* logic is not only about introducing the principle of mutual recognition, but crucially also about accepting the indispensable counterweight to protect higher objectives for the Member States of importation. Therefore it would make no sense and even be deceptive for market actors to codify the principle of mutual recognition into a national law that puts into place a system of prior authorization for foodstuffs in order to protect consumers and public health.<sup>67</sup> The crux of the argument goes back to the very core and coherence of *Cassis de Dijon* in terms of avoiding regulatory competition between the Member States,<sup>68</sup> not eliminating national regulatory discretion altogether. This was seemingly so understood by the CJEU. Whilst expressly pointing out that the national measures at stake was indeed caught by article 34 TFEU and did not contain the principle of mutual recognition,<sup>69</sup> it stressed that “*national legislation which makes the addition of a nutrient to a foodstuff lawfully manufactured and/or marketed in other Member States subject to prior authorisation is not, in principle, contrary to Community law, provided that certain conditions are satisfied*”.<sup>70</sup> It was only because the latter was not held to be fulfilled in casu that the French legislation was found to be incompatible with EU law. Not because of the mere absence of the principle of mutual recognition as had been argued by the Commission with reference to *Foie gras*.<sup>71</sup>

In spite of this rather clear answer provided by the CJEU, the Commission nonetheless persevered and again initiated an infringement procedure against France for legislating a prior authorization scheme for processing aids and foodstuffs without inserting the principle of mutual recognition. The CJEU finally unequivocally clarified:

*“The Commission’s argument in paragraph 64 of this judgment concerning the nature of the mutual recognition clause necessary in order to comply with Community law cannot be accepted.”*

*“.., to require in national legislation establishing a prior authorisation scheme that a mutual recognition clause be included such as that contemplated by the Commission in paragraph 64 of this judgment would go against the very rationale of such a scheme, since the Member State concerned would be obliged to allow the marketing on its*

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<sup>66</sup> Case C-24/00, *Commission v. France (Additives)*, EU:C:2004:70.

<sup>67</sup> Case C-24/00, o.c., at para 19.

<sup>68</sup> See above.

<sup>69</sup> Case C-24/00, o.c., at para 23-24.

<sup>70</sup> Case C-24/00, o.c., at para 25.

<sup>71</sup> Case C-24/00, o.c., see at para 17: “Relying on the judgment in Case C-184/96 *Commission v France* [1998] ECR I-6197, the Commission argues that the absence in the French legislation of provision for mutual recognition is sufficient to demonstrate the failure to fulfil obligations.”

*territory of processing aids and foodstuffs benefiting from that clause without being able to verify the absence of genuine risks for public health”.*<sup>72</sup>

In essence this brings down, in a compulsory manner, the full assessment of *Cassis de Dijon* to the level of the Member States in their sovereign regulatory capacity. In line with the distinction put forward by Advocate General Mazák to reconcile the at first sight contradictory outcome of the prior rulings,<sup>73</sup> where no higher objectives are targeted by the national legislation the principle of mutual recognition should be codified in national law, and vice versa.

There is, however, a major difference. In *Cassis de Dijon* the balancing trick between the rule and the higher objective exceptions was performed by a specialized EU judiciary, ex post, and on a case by case basis. This is now transformed in an abstracto exercise to be performed ex ante by the national regulator, who will necessarily also have to look beyond the own borders to take into account the regulatory framework adopted in other Member States<sup>74</sup>. The complexity of such a compulsory balancing trick to be performed at the national regulatory level cannot be ignored. Combined with the uncertainties and controversies that have emanated from *Cassis de Dijon* this difficulty is even more exacerbated. Inevitably the national regulator then also expertly needs to appraise and apply the follow up case law to *Cassis de Dijon*, in particular the *Keck & Mithouard* and *Tripeds* cases.<sup>75</sup>

## **5. Conclusion**

The above reflections serve to illustrate that what you see is thus not necessarily what you get. *Cassis de Dijon* on the face of it introduces a judge made principle, with countervailing exceptions, to further the internal market objective in spite of regulatory inertia. A closer look reveals a major and decisive impact on the making and shaping of that very regulatory framework, both at EU and Member States level. Partly due to its instrumentalization by the Commission, *Cassis de Dijon* blurs the lines between the respective roles of judiciary and regulator, conferred, reserved and discretionary competence, as well as EU and national regulatory prerogatives in a system of multi-layered governance.<sup>76</sup> As a consequence, the emerging picture of the regulatory impact of *Cassis de Dijon* is complex and subject to a changing appraisal according to the angle from which it is being studied. In that sense it

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<sup>72</sup> Case C-333/08, *Commission v. France* (prior authorization scheme), EU:C:2010:44, para 107 and 109 respectively. In para 64 it is reported that the Commission “argues that, since other Member States must comply with the requirements, in particular, of Article 14 of Regulation No 178/2002 in relation to the rules concerning foodstuffs placed on the market, and an infringement of Community law by the latter cannot be presumed, a mutual recognition clause should be limited to providing that the provisions of the relevant national legislation shall not hinder the principle of the free movement of foodstuffs in the preparation of which processing aids have been used which do not comply with the provisions of that legislation but which come from other Member States of the Community where they are lawfully manufactured and/or marketed.”

<sup>73</sup> Case C-333/08, *Commission v. France* (Prior authorization scheme), Opinion of Advocate General Mazák, ECLI:EU:C:2009:523, see at para 62: “Some uncertainties may be raised by the comparison of the judgment in Case C-184/96 *Commission v France*(..) with the judgment in Case C-24/00 *Commission v France*. (..) In both cases, the Commission alleged that the French Republic had failed to insert a mutual recognition clause in its legislation, so hindering the free movement of goods. Whereas, in the first case, the Court found there was a failure to fulfil obligations, in the second case it dismissed that allegation of failure to fulfil obligations. However, those cases may be distinguished by the fact that whilst, in the second case, the French Republic proved that its legislation hindering the free movement of goods was justified by the protection of public health, in the first case, no consideration relating to the protection of public health was put forward.”

<sup>74</sup> See supra at pt. 2.a.

<sup>75</sup> See above at pt. 1.

<sup>76</sup> See also L. Hooghe, G. Marks o.c., especially at pp. 26-27. At p. 26 it is pointed out that whereas the CJEU “rulings are pivotal in shaping European integration”, it “depends on other actors to force issues on the European political agenda and to condone its interpretations”; continuing on from there that it is the Commission that has put *Cassis de Dijon* on the ‘wider agenda’.

presents striking resemblances also to another famous oil on canvas by the Belgian surrealist painter René Magritte, *Les mystères de l'horizon*, known in English under the befitting name 'The Masterpiece' or 'The Mysteries of the Horizon'.<sup>77</sup> To visualize this painting, it “.. depicts three seemingly identical men in bowler hats. They are in an outdoor setting at twilight. Though they appear to be sharing the same space each one also seems to exist in a separate reality. Each is facing a different direction. In the sky above each figure is a separate waxing crescent moon”.<sup>78</sup> The three different angles taken here to reflect upon the regulatory impact of *Cassis de Dijon*, namely EU positive regulation, delimitation of competence, as well as Member States regulatory discretion, similarly drew on the common features of mutual recognition and mandatory requirements to reveal fundamentally different effects and horizons. Although often studied in isolation, only all those different facets of *Cassis de Dijon* taken together reveal the bigger picture of the legal masterpiece created by the CJEU.

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<sup>77</sup> “The viewer is presented with three apparently identical men wearing bowler hats and with clearly defined outfits, placed outdoors in a dusk of indigo and black. Each upright figure has his own crescent moon hanging over him, and they all face different ways. One looks towards the white glow of the horizon, while the second shows a little of his face as he turns towards the left hand distance, and the third is seen in profile. The initial impression may be that they are sharing the same space, but they could also be inhabiting separate worlds, although it is impossible for the eye to discern where one person's sky becomes another's.”, see <http://www.rene-magritte.com/mysteries-of-the-horizon/> (as last consulted on 21/05/2020).

<sup>78</sup> See <https://magritte.brussels/index.php/portfolio/221/> (as last consulted on 21/05/2020).



## RESEARCH PAPERS IN LAW

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